



THE UNITED STATES  
CONFERENCE OF MAYORS



July 6, 2021

The Honorable Michael Regan  
Administrator  
U.S. Environmental Protection Agency  
1200 Pennsylvania Avenue, NW  
Washington, DC 20004

**Re: California State Motor Vehicle Pollution Control Standards; Advanced Clean Car Program; Reconsideration of a Previous Withdrawal of a Waiver of Preemption (Docket ID: EPA-HQ-OAR-2021-0257)**

Dear Administrator Regan:

The Sabin Center for Climate Change Law submits these comments together with the National League of Cities (NLC), The U.S. Conference of Mayors (USCM), and the International Municipal Lawyers Association (IMLA) in response to the Environmental Protection Agency's (EPA) reconsideration of Part One of the Safer Affordable Fuel-Efficient Vehicles Rule (SAFE 1), which withdrew a waiver of preemption for California's zero emission vehicle (ZEV) mandate and greenhouse gas emission standards within the California Advanced Clean Car program. For the reasons that follow we support EPA's proposal to rescind SAFE 1.

**1. Cities Are Grappling with Transportation Pollution**

SAFE 1 frustrates local governments' efforts to address greenhouse gas and conventional pollution from transportation. Over 80 percent of Americans live in urban areas—and even more work there—meaning that city governments are responsible for understanding the risks to, and planning for the wellbeing of, the great majority of Americans.<sup>1</sup> Climate change can exacerbate cities' existing challenges, including social

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<sup>1</sup> Center for Sustainable Systems, University of Michigan. 2020. "U.S. Cities Factsheet." Pub. No. CSS09-06.

inequality, aging and deteriorating infrastructure, and stressed ecosystems.<sup>2</sup> Cities' costs to recover from damage caused by climate change will be enormous. By 2100, unmitigated climate change could every year cause 57,000 pollution-related deaths, at a cost of \$930 billion; lead to 1.2 billion lost labor hours, valued at \$110 billion; and result in hundreds of billions of dollars in infrastructure, water supply and other costs.<sup>3</sup>

Cities are not only on the front lines of climate impacts—they are also at the forefront of climate change adaptation and mitigation efforts nationwide. In fact, in 2019, 60% of U.S. cities launched or significantly expanded an initiative to address climate change, such as a green vehicle procurement program or new energy policy.<sup>4</sup> Yet, local governments have limited ability to regulate the circumstances imposed on them by the wider world. A 2017 study found that by collaborating with national governments and other partners, cities can achieve over half of the emissions reductions that are necessary to limit warming to 1.5° Celsius; but acting unilaterally, cities can deliver only 5% of the total emissions reductions needed to reach that goal.<sup>5</sup>

Moreover, vehicle emissions impact air quality and a community's ability to meet required ozone levels. Falling outside of required ozone levels can have negative impacts on cities, potentially disqualifying them from federal funding opportunities for highway and transit infrastructure. Robust vehicle emission standards that promote market adoption of zero- and low-emitting vehicles are key to ensuring that cities are able to meet ozone requirements.

## **2. In Issuing SAFE 1 EPA Failed to Consider the Action's Impacts**

The notice proposing to rescind SAFE 1 states, “EPA believes there are significant issues regarding whether [SAFE 1] was a valid and appropriate exercise of agency authority, including . . . whether EPA took proper account of the . . .

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<sup>2</sup> See Maxwell, K., et al., *Ch. 11: Built Environment, Urban Systems, and Cities in Impacts, Risks, and Adaptation in the United States: Fourth National Climate Assessment, Volume II* (Reidmiller, D.R. et al., eds. 2018). U.S. Global Change Research Program, Washington, DC, USA, pp. 439.

<sup>3</sup> EPA. 2015. Climate Change in the United States: Benefits of Global Action. United States Environmental Protection Agency, Office of Atmospheric Programs, EPA 430-R-15-001 at 78, <https://bit.ly/2xc5uC0>.

<sup>4</sup> Alliance for a Sustainable Future, MAYORS LEADING THE WAY ON CLIMATE 2 (Jan. 2020), <https://bit.ly/2T4tMpY>.

<sup>5</sup> C40 & ARUP, DEADLINE 2020 79-80 (June 1, 2017), <https://bit.ly/2YL5J2f>. Although holding global temperature increase to 2 degrees Celsius was a commonly stated goal before 2015, the Paris Agreement seeks to limit warming to 1.5 degrees. “Climate-related risks to health, livelihoods, food security, water supply, human security, and economic growth are projected to increase with global warming of 1.5°C and increase further with 2°C.” IPCC, 2018: Summary for Policymakers. In: Global Warming of 1.5°C. (Masson-Delmotte, et al.) at 9.

environmental consequences from the waiver withdrawal.”<sup>6</sup> We agree.

EPA unlawfully failed to consider the impacts of withdrawing California’s waiver, and specifically, that the action could increase pollution.<sup>7</sup> Neither the preliminary nor the final regulatory impact assessment for the Safer Affordable Fuel-Efficient Vehicles Rule discussed the impacts of revoking California’s waiver,<sup>8</sup> and no regulatory impact assessment was released when SAFE 1 was finalized. However, the effects of California’s ZEV mandate and greenhouse standards are significant, and therefore, the effects of EPA’s action in halting those standards are significant.

California’s motor vehicle rules have the capacity to shape the national market and reduce pollution levels across the country. As EPA recognizes, prior to the issuance of SAFE 1, 13 states adopted California’s motor vehicle rules under Section 177 of the Clean Air Act, and other states are in the process of doing so.<sup>9</sup> California’s standards can also achieve nationwide emissions reductions more indirectly; Congress intended for California to serve as “a kind of laboratory for innovation” in motor vehicle pollution controls.<sup>10</sup> California’s ZEV mandate serves a crucial technology-forcing purpose by requiring manufacturers to produce increasing numbers of ZEVs and hybrids. By spurring commercialization of zero- and low-emission vehicles, California’s standards have ripple effects beyond even its borders and the Section 177 states. Prohibiting the ZEV program and California’s greenhouse gas standards risks stifling the market’s growth and frustrating efforts to address transportation emissions. EPA’s failure to even acknowledge, let alone consider, that the waiver revocation would likely increase pollution rendered the action arbitrary and capricious.<sup>11</sup>

Equally arbitrary and capricious was EPA’s failure to consider the urgent need to

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<sup>6</sup> 86 Fed. Reg. 22,421, 22,421 (Apr. 28, 2021).

<sup>7</sup> See *Dep’t of Homeland Security v. Regents of the Univ. of Cal.*, 140 S. Ct.1891, 1911 (2020) (An agency may not “entirely fail[] to consider [an] important aspect of the problem.” (quoting *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

<sup>8</sup> See EPA Science Advisory Board Consideration of the Scientific and Technical Basis of the EPA’s Proposed Rule titled *The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021-2026 Passenger Cars and Light Trucks* (Feb. 27, 2020) at 29, <https://bit.ly/37iT3Cg> (“[W]e note that the PRIA does not examine the societal consequences (benefits or costs) of this legal interpretation [the EPCA Preemption Rule and waiver revocation], even though it represents a substantial change in policy.”); Final Regulatory Impact Assessment of the SAFE Rule (March 31, 2020) at 63 n.27, available at <https://bit.ly/3cUKHIS> (“Agency actions relating to California’s CAA waiver and EPCA preemption have since been finalized, see 84 FR 51310 (Sept. 27, 2019), and will not be discussed in great detail as part of this final rule.”).

<sup>9</sup> 86 Fed. Reg. at 22,429.

<sup>10</sup> *Engine Mfrs. Ass’n*, 88 F.3d at 1080 (quoting *Motor and Equipment Mfrs. Ass’n, Inc. v. EPA*, 627 F.2d 1095, 1111 (D.C. Cir. 1979)).

<sup>11</sup> See *Regents of the Univ. of Cal.*, 140 S. Ct. at 1911.

reduce transportation pollution in order to address climate change. “The ‘requirement that agency action not be arbitrary and capricious includes a requirement that the agency adequately explain its result.’”<sup>12</sup> Revoking California’s preemption waiver threatened to undercut efforts to reduce greenhouse gases across the country by potentially slowing market penetration of zero- and low-emission vehicles. In issuing SAFE 1 EPA offered no rational connection between the record, which overwhelmingly established the imperative to decrease greenhouse gas pollution from the transportation sector, and its policy decision. For example, state and city commenters, citing the Fourth National Climate Assessment, warned that many U.S. cities are increasingly threatened by vector-borne disease, heat waves, and sea-level rise as a result of climate change.<sup>13</sup> Commenters further noted that transportation is “the top contributor to U.S. greenhouse gas emissions.”<sup>14</sup> These facts call for urgent action to reduce greenhouse gas emissions—not action to obstruct states from addressing the problem. SAFE 1 must therefore be rescinded.

### **3. In Revoking the Preemption Waiver EPA Misconstrued the Clean Air Act and California’s Motor Vehicle Standards**

EPA also raises concerns about “whether EPA took proper account of the environmental conditions in California” in issuing SAFE 1, and seeks comment on whether California’s mobile source emissions standards have both criteria emission and greenhouse gas emission benefits and purposes.<sup>15</sup> We share these concerns. In promulgating SAFE 1 EPA misconstrued the purposes and benefits of California’s greenhouse and ZEV standards and misapplied the law.

In issuing SAFE 1 EPA concluded that California may not seek to address climate change through its motor vehicle pollution controls because the state cannot make a meaningful dent in global greenhouse gas emissions.<sup>16</sup> In doing so, EPA ran afoul of the Supreme Court’s admonition that “[a]gencies, like legislatures, do not generally resolve massive problems in one fell regulatory swoop.”<sup>17</sup> EPA also ignored its own finding—which has not been rescinded—that even where “individual greenhouse gas source categories could appear small in comparison to the total,” contributors must all do their part to reduce greenhouse gas emissions.<sup>18</sup> EPA did not and could not offer any

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<sup>12</sup> *Snohomish Cty, Wash. v. Surface Transp. Bd.*, 954 F.3d 290, 301 (D.C. Cir. 2020) (quoting *Jost v. Surface Transp. Bd.*, 194, F.3d 79, 85 (D.C. Cir. 1999)).

<sup>13</sup> NHTSA-2018-0067-12361\_3, 6, 12-13.

<sup>14</sup> NHTSA-2018-0067-12361\_3.

<sup>15</sup> 86 Fed. Reg. at 22,421, 22,429.

<sup>16</sup> 84 Fed. Reg. 51,340.

<sup>17</sup> *Massachusetts*, 549 U.S. at 524; *see also id.* (rejecting the “erroneous assumption that a small incremental step, because it is incremental, can never be attacked in a federal judicial forum”).

<sup>18</sup> 74 Fed. Reg. 66,495, 66,543 (Dec. 15, 2009).

“reasoned explanation” for abandoning this principle.<sup>19</sup> Moreover, the attempt to hamstring California on the ground that California alone cannot stop climate change has dangerous implications for the many local governments that, knowing they cannot fully resolve the problem, are making strides to reduce greenhouse gases through local laws, climate action plans, green procurement programs, and other local initiatives.

EPA also ignored the connection between the greenhouse gases that cause climate change and criteria pollutants such as precursors to ozone, which pose a threat to cities and increase with temperature rise.<sup>20</sup> Additionally, motor vehicle emissions are themselves a significant source of criteria pollutants in cities.<sup>21</sup> EPA arbitrarily and capriciously disregarded the significant criteria benefits of both greenhouse gas and zero-emission vehicle standards—in other words, cars that meet relatively stringent greenhouse gas standards emit relatively fewer criteria pollutants, and zero-emitting cars emit no such pollutants.<sup>22</sup> SAFE 1 was accordingly not a valid exercise of EPA’s authority and must be rescinded.

#### **4. Rescinding SAFE 1 Would Support Local Governments’ Efforts to Address Transportation Pollution**

EPA seeks comment on whether all relevant reliance interests were properly identified and considered when SAFE 1 was issued.<sup>23</sup> They were not.

When the SAFE Rule was proposed, many local governments in California—and in states that had adopted California’s standards under Clean Air Act Section 177—submitted comments explaining that their climate action plans relied on the existing motor vehicle emission standards.<sup>24</sup> Additionally, as discussed, California’s preemption waiver facilitated market penetration of ZEVs. By revoking the waiver and potentially

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<sup>19</sup> *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (“To be sure, the requirement that an agency provide reasoned explanation for its action would ordinarily demand that it display awareness that it *is* changing position.”) (emphasis in original).

<sup>20</sup> *See, e.g.*, AMERICAN LUNG ASSOCIATION, STATE OF THE AIR 2021 13, 20, 26 (April 21, 2021); C.G., P.D. Dolwick, N. Fann, L.W. Horowitz, V. Naik, R.W. Pinder, T.L. Spero, D.A. Winner, and L.H. Ziska, 2018: Air Quality. In *Impacts, Risks, and Adaptation in the United States: Fourth National Climate Assessment, Volume II* [Reidmiller, D.R., C.W. Avery, D.R. Easterling, K.E. Kunkel, K.L.M. Lewis, T.K. Maycock, and B.C. Stewart (eds.)]. U.S. Global Change Research Program, Washington, DC, USA, p. 517.

<sup>21</sup> *See* AMERICAN LUNG ASSOCIATION, *supra* note 20 at 20-21.

<sup>22</sup> *See, e.g.*, Staff Report: Initial Statement of Reasons 2012 Proposed Amendments to the California Zero Emission Vehicle Program Regulations, California Air Resources Board (Dec. 7, 2011).

<sup>23</sup> 86 Fed. Reg. at 22,429.

<sup>24</sup> *See, e.g.*, EPA-HQ-OAR-2018-0283-5687 (Sacramento); EPA-HQ-OAR-2018-0283-3899 (Eugene); EPA-HQ-OAR-2018-0283-3903 (Boulder); EPA-HQ-OAR-2018-0283-4017 (Chula Vista); EPA-HQ-OAR-2018-0283-3907 (Ojai); EPA-HQ-OAR-2018-0283-5472 (Aspen); EPA-HQ-OAR-2018-0283-5685 (Portland).

stifling ZEV market growth, EPA frustrated cities' efforts to meet electric vehicle procurement targets that, in many cases, underpin local climate goals. In issuing SAFE 1 EPA omitted any mention of local policy initiatives that rely on California ZEV and greenhouse gas standards, rendering SAFE 1 arbitrary and capricious.<sup>25</sup> By rescinding the action and allowing those standards to come into effect, EPA would reinstate the conditions on which many local governments relied in setting their climate goals.

## **5. SAFE 1 is Unlawful Because EPA Failed to Consider Its Environmental Justice Impacts**

Finally, SAFE 1 was not a valid exercise of EPA's authority because EPA failed to account for environmental justice considerations.<sup>26</sup> EPA's conclusory assertion in the SAFE 1 preamble that "this action will not have disproportionately high and adverse human health or environmental effects on minority or low-income populations" is indefensible.<sup>27</sup> The record before EPA demonstrated the disproportionate impacts that both climate change and criteria pollutants have on low-income communities and communities of color, and EPA's earlier findings—which have not been rescinded—indicate that, as cities well know, both climate change and conventional pollution disproportionately harm low-income communities and communities of color.<sup>28</sup> EPA cannot ignore issues before it, and it "cannot simply disregard contrary or inconvenient factual determinations that it made in the past."<sup>29</sup>

In issuing SAFE 1 EPA contended that the connection between its action and the impacts felt in low-income communities or communities of color as a result of increased vehicle emissions in California and Section 177 states is too attenuated and not foreseeable.<sup>30</sup> EPA offered no foundation for this assertion, which is illogical on its face given the undeniably direct link between tailpipe emissions of criteria pollutants and health impacts on local residents.<sup>31</sup> Moreover, as discussed, EPA cannot dismiss the

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<sup>25</sup> *Regents of the Univ. of Cal.*, 140 S. Ct. at 1914 (“[B]ecause [EPA] was not writing on a blank slate, . . . it was required to assess whether there were reliance interests, determine whether they were significant, and weigh any such interests against competing policy concerns.”).

<sup>26</sup> *See State Farm*, 463 U.S. at 52.

<sup>27</sup> 84 Fed. Reg. at 51,360.

<sup>28</sup> *See, e.g.*, NHTSA 2018-0067-12368\_231; 80 Fed. Reg. 64,510, 64,670 (Oct. 23, 2015); 74 Fed. Reg. at 66,526.

<sup>29</sup> *Mozilla Corp. v. FCC*, 940 F.3d 1, 55 (D.C. Cir. 2019) (quoting *Fox Television*, 556 U.S. at 537 (Kennedy, J., concurring)); *see also Am. Wild Horse Preserv. Campaign*, 873 F.3d at 932 (holding action arbitrary and capricious where agency “brushed aside critical facts about its past treatment of and official statements about” the issue at hand).

<sup>30</sup> 84 Fed. Reg. at 51,360.

<sup>31</sup> *See id.* at 51,339 (recognizing that criteria pollutants emitted from tailpipes in California cause health and welfare effects in California).

effects of greenhouse gas emissions that will result from its action.<sup>32</sup> EPA's failure to meaningfully consider environmental justice concerns constitutes yet another reason that its action in withdrawing California preemption waiver was arbitrary and capricious and cannot stand.<sup>33</sup>

For these reasons, we support EPA's proposal to rescind SAFE 1. If you have any questions, please do not hesitate to contact our staff: Judy Sheahan, the U.S. Conference of Mayors (jsheahan@usmayors.org or 202-861-6775); Carolyn Berndt, National League of Cities (berndt@nlc.org or 202-626-3101); Deanna Shahnami (dshahnami@imla.org or 202-742-1019); and Hillary Aidun, Sabin Center (hwa2108@columbia.edu or 212-854-0081).

Sincerely,



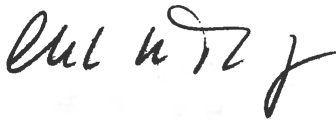
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<sup>32</sup> See *Massachusetts*, 549 U.S. at 524 (rejecting the “erroneous assumption that a small incremental step, because it is incremental, can never be attacked in a federal judicial forum”).

<sup>33</sup> *State Farm*, 463 U.S. at 52.